1990

The State of Utah vs. Donald Kitchen : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

THE STATE OF UTAH,	:	
Plaintiff/Respondent,	:	**BRIEF OF APPELLANT**
vs.	:	Case No. 900307 CA
DONALD KITCHEN,	:	Priority No. 2
Defendant/Appellant.	:	

APPEAL FROM THE FOURTH DISTRICT COURT
IN AND FOR JUAB COUNTY
THE HONORABLE BOYD L. PARK, PRESIDING

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STATEMENT OF JURISDICTION

This is an appeal of right made pursuant to Title 77, Part 35, Section 26 of the Utah Code and Rule 3(a) of the Rules of the Utah Court of Appeals. This court has appellate jurisdiction in this case pursuant to Title 28, Part 2a, Section 5(2) of the Utah Code.

NATURE OF THE PROCEEDING

This is an appeal from a final judgment of conviction of the second degree felony offense of possession of a controlled substance, cocaine, with intent to distribute entered in the Fourth District Court in and for Juab County following a bench trial before the Honorable Boyd L. Park, District Judge.

STATEMENT OF ISSUES PRESENTED

POINT I: Whether it is "unreasonable" to stop and detain all motorists at a roadblock because Utah statutes limit the authority of officers to stop persons either for the purpose of checking driver's licenses and vehicle safety or to investigate possible criminal violations to situations where the officer has reasonable suspicion that a violation has occurred.

POINT II: Whether roadblocks are per se unconstitutional under Section 14, Article I, of the Constitution of Utah.

POINT III: In the alternative, whether the roadblock in this case violated the state and federal constitutions because it was not conducted pursuant to standards which were developed by policy making officials in response to a particularized, justifying, public need and which minimized the discretion of officers in the field and the intrusion upon rights of the public.

POINT IV: Whether the warrant clause of Section 14, Article I of the Constitution of Utah prohibits a warrantless search of luggage in a vehicle where there is no evidence that delay to get a warrant would endanger the officers or evidence.

DETERMINATIVE CONSTITUTIONAL PROVISION AND STATUTE

The Fourth Amendment to the United States Constitution and Section 14, Article I of the Constitution of Utah provide:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 41-1-17, Utah Code Annotated, provides in relevant part:

> **Department and officers to enforce provisions.**
>
> The commission, and such officers and inspectors of the department as it shall designate, peace officers, state patrolmen, and others duly authorized by the department or by law shall have power and it shall be their duty:
>
> . . . .
>
> (c) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this act or of any other law regulating the operation of vehicles to require the driver thereof to stop, exhibit his driver's license and the registration card issued for the vehicles and submit to an inspection of such vehicle, the registration plates and registration card thereon.

STATEMENT OF THE CASE

Nature of the Case

The appellant, Donald Kitchen, was charged by information with the second degree felony of possession of cocaine, a controlled substance, with intent to distribute in violation of Section 58-37-1(a), Utah Code.

Course of the Proceedings and Disposition

Prior to trial, appellant made a motion to suppress all evidence seized by law enforcement officers as a result of the detention of the appellant at a roadblock and the subsequent searches of his automobile for the reason that the detention and searches were in violation of the Fourth Amendment to the United States Constitution and Section 14, Article I of the Constitution of Utah. (R-9). An evidentiary hearing was held at which the facts surrounding the implementation of a roadblock on I-15 in Juab County, the detention of appellant at that roadblock and the subsequent searches of the appellant's vehicle, were developed. Following briefing by the parties, the district court filed a Ruling setting out its findings and conclusions and denying the motion to suppress. (R-26-36).

The appellant waived his right to jury trial and matter was

submitted to the district court upon the stipulation of the parties that the court make a determination of guilt or innocence based upon the evidence submitted at the motion to suppress. Based upon that evidence, the court found the appellant guilty. (Hearing Transcript, May 8, 1990).

Following the preparation of a pre-sentence report, the appellant was sentenced to pay a fine and serve a prison sentence which was suspended upon the condition that the appellant serve 120 days in jail and submit to other conditions of probation. The district court issued a Certificate of Probable Cause and Stay staying the sentence pending this appeal. (R-48).

The final, written Judgment was filed on June 21, 1990. (R-54). The Notice of Appeal was filed on June 5, 1990 (R-44), immediately following the imposition of sentence in open court.

Relevant Facts

The evidence supporting the appellant's conviction was obtained as a result of the seizure of the appellant and the search of his vehicle by law enforcement officers at a roadblock on I-15 in Juab County on May 17, 1989. The roadblock was established under the supervision of Highway Patrol Sergeant Paul Mangelson in connection with a "criminal interdiction" class which Sergeant Mangelson was teaching to local law

enforcement officers, and which, according to Sergeant Mangelson, involved:

> Teaching them techniques of getting into vehicles. Certain things that indicate contraband in the vehicles what have you.

(Transcript, Suppression Hearing at pp. 5, 6, 17, 18 [Hereinafter T-__]). However, Sergeant Mangelson testified that the purpose of the roadblock itself was a safety check of equipment and driver's licenses. (T-41-42). Sergeant Mangelson was teaching officers what things to look for which might indicate illegal activity, in the routine course of duty rather than teaching them how to conduct a roadblock. (T-42). Apparently, the roadblock served the function of providing a large number of motorists upon which to demonstrate and practice these skills.

Neither the Department of Motor Vehicles nor the Highway Patrol have any regulations on how to conduct roadblocks. (T-18-19). The plan for conducting the roadblock was devised by Sergeant Mangelson and approved by his supervisor, Lieutenant Utley. (T-19). The location in Juab County was selected because of the traffic conditions there. (T-19). Traffic in both directions was intercepted and commercial traffic was diverted around the roadblock while all other traffic was directed into a lane delineated by orange cones to wait to talk to officers. An

officer would request the driver's license and vehicle registration and look over the vehicle, and, occupants and if there were any problem, the vehicle would be directed to the side of the road for further investigation. (T-8).

Orange signs similar to those used to warn of road construction were placed along the approach to the roadblock, the first showing the symbol of a flag man, the second stating "Prepare to Stop" and the third stating "All Traffic Must Stop." (T-22). The first sign was positioned one quarter mile in advance of the roadblock. (T-24). The roadblock was positioned so that motorists could not avoid it by exiting the interstate and officers were stationed to pursue anyone, even a passenger, who attempted to avoid the roadblock. (T-25). Approximately 35 officers were involved in the operation. (T-6).

A notice that the Highway Patrol would conduct roadblocks in Juab County in the summer months had been published in the Daily Herald of Orem on May 2, 1989 and the Times News of Juab County on May 3, 1989. (T-19-22). Sergeant Mangelson testified that only a small percentage of the people stopped were from the circulation area of those newspapers (T-21) and that the likelihood of anyone traveling in either direction on the interstate highway having read the local papers was remote. (T-37).

At about 11:00 a.m.,[1] the appellant, accompanied by a passenger, Daniel Burke, drove up to the roadblock. (T-26). They were diverted into the area delineated by orange cones and waited for at least five or ten minutes (T-69-86) behind four to eight cars which were in line ahead of them (T-73-91) until Officer John Lloyd approached and requested appellant's driver's license and vehicle registration (T-9), which the appellant produced. (T-28).

Mr. Burke testified that while appellant was talking to Officer Lloyd, Sergeant Mangelson, who was walking along observing the cars in line ahead of them (T-75), walked around the front of their car and opened the passenger door requesting identification from Mr. Burke. (T-63). Mr. Burke gave him his driver's license and answered questions about his destination. Sergeant Mangelson asked if they had any drugs or money and Mr. Burke said "no." Sergeant Mangelson then said, "Well, then you don't mind if we look around." Mr. Burke deferred to appellant who indicated that he would not consent to a search. (T-65). Sergeant Mangelson responded by ordering appellant to pull the car over on the shoulder of the road and then ordered Mr. Burke out of the car. Sergeant Mangelson then leaned into the car and

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[1] The roadblock began at 7:00 a.m. and was to be maintained until noon. Ibid.

appeared to look around after which he turned and asked Mr. Burke if he "smoked a little grass." Mr. Burke said "no" and Sergeant Mangelson said "you might as well give it to me because I know you have it." Mr. Burke denied having any and held up his arms while Sergeant Mangelson "frisked" him without result. Sergeant Mangelson then went back to searching the car (T-66) and, after Sergeant Mangelson apparently located some contraband, Mr. Burke heard him arrest appellant, who was still in the car, and then instructed another officer to arrest Mr. Burke. (T-67).

Mr. Burke testified that after he was arrested he stood by the line of vehicles and observed that older people were waived through the roadblock without having to produce a driver's license. (T-68). Other cars were searched "a little bit" and the car behind appellant's, which was occupied by a young couple, was searched by officers including suit cases which were in the truck, apparently without incriminating result because the young couple was allowed to leave. (T-68).

The appellant gave testimony similar to Mr. Burke. He testified that he was approached at the roadblock by an officer who asked for his driver's license and registration which he produced. There ensued a conversation about his destination and his permission to drive the car which was his mother's. The officer then asked another officer if it was allright to let them

go. At that time the passenger door was opened, surprising the passenger who was leaning on it. (T-86-87).

After the conversation between Mr. Burke and Sergeant Mangelson, the Sergeant asked for permission to search the vehicle. When appellant refused, Sergeant Mangelson ordered him to pull his car over to the shoulder of the highway. Sergeant Mangelson then leaned into the car and commenced to search through the console between the seats. (T-88). At that point, Sergeant Mangelson told appellant that he smelled Marijuana and that he wanted it produced to save everyone time and trouble. The appellant pulled a small quantity of Marijuana out of the console "Because he was searching there anyway . . . I thought he would be a lot nicer if I gave it to him." (T-89).

Officer John Lloyd, the officer who first approached appellant and requested his driver's license, did not testify. Sergeant Mangelson testified that he was standing behind Officer Lloyd while Lloyd talked to appellant and could detect a strong odor of burnt Marijuana coming from the vehicle. (T-9). Sergeant Mangelson then walked around the car to the passenger side and asked if there were Marijuana in the vehicle and was told there was not. Sergeant Mangelson asked if he could look around the vehicle and when he was refused, ordered the vehicle to the side of the road. Sergeant Mangelson testified he ordered

the passenger out of the vehicle and announced that he could smell Marijuana and they might as well give it to him. Appellant produced two baggies that appeared to contain about a quarter ounce of Marijuana. (T-10, 16). While Sergeant Mangelson's testimony conflicted with that of appellant and Mr. Burke in that he claimed he requested and received the Marijuana before he started to search, he also testified that he had decided he would search and made that clear to appellant at the time he told him to produce it and "save us a lot of time and trouble." (T-30-32).

Sergeant Mangelson testified that he noticed a bulge in appellant's shirt pocket and asked what it was. The appellant, who appeared to be very nervous, replied it was money and when asked how much said, "$2,000.00", explaining he was going to Las Vegas to gamble. Appellant, at the Sergeant's request, produced the bundle and Sergeant Mangelson counted $1,000.00 of it and concluded that there was a lot more than $2,000.00. (T-11).

Sergeant Mangelson then discovered a small vial with white powder, which appeared to him to be cocaine, in the console between the car seats (T-12), and formally placed appellant and Mr. Burke under arrest. Searching the car further, the officers located seven baggies, containing what was later determined to be a total of 27 ounces of cocaine, in one of three suit cases in

the back of the vehicle. (T-13).

In a later search, officers discovered a small vial, containing the remnants of Marijuana cigarettes, in a pouch in the passenger door of the vehicle. (T-14).

SUMMARY OF ARGUMENT

The probable cause for the searches which produced the incriminating evidence in this case derived directly from the initial seizure of the person and automobile of the appellant at the roadblock established by field officers of the Highway Patrol.

Point I. This seizure was in violation of both Section 14, Article I of the Utah Constitution and the United States Constitution because the Utah Legislature has specifically limited the authority of law enforcement officers to stop motorists for purposes of checking driver's licenses and safety inspections and for purposes of investigating criminal activity to situations where the officer has a reasonable belief a vehicle is being operated in violation of law or reasonable suspicion that a public offense is, has been or will be committed.

Point II. Regardless of the question of statutory authority, the Utah Constitution prohibits seizures of the person in the absence of particularized suspicion, rendering roadblocks

per se unconstitutional. The Utah Constitution provides more protection to privacy than the United States Constitution. The value of privacy varies from state to state, and Utah's unique history and culture has resulted in a higher degree of protection of privacy and liberty than the minimum level mandated by the national constitution. Idaho, the state with the most similar history and culture and an identically worded constitution, prohibits roadblocks as per se unconstitutional.

Point III. Alternatively, if roadblocks are permitted under the Utah Constitution, and, if legislation is not required, the roadblock in this case was nonetheless unconstitutional because it was not conducted pursuant to standards, which were developed and enforced by policy making officials in response to an particularized and justifying need and which minimized the discretion of the officers in the field and the intrusion upon privacy and liberty of the traveling public.

Point IV. Regardless of the legality of the initial seizure and search, and assuming the existence of probable cause, the warrantless search of appellant's suitcase in the back of his vehicle was in violation of Section 14, Article I of the Constitution of Utah because the warrant clause requires that a warrant be obtained unless the state proves that the ensuming delay would have endangered the officers or the integrity of the

evidence. The search of the suitcase did not occur until after the vehicle and its occupants were securely in the custody of the many officers at the scene. The search of the suitcase was not claimed to be an inventory search, nor could it have been, because the opening of containers is not constitutionally permitted in the absence of a standardized procedure mandating the opening of all containers whenever a vehicle is impounded.

DETAIL OF ARGUMENT

INTRODUCTION

The evidence upon which the appellant was convicted was all seized during the searches of the appellant's vehicle at the roadblock and later at an impound lot. The district court found, Ruling (R-33), that the probable cause for these searches was that Sergeant Mangelson could smell the odor of Marijuana coming from the car while appellant was talking to Officer Lloyd through the driver's window. However, it is elementary that probable cause, and even reasonable suspicion for a seizure, cannot be based upon an olfaction made during, and as a exploitation of, an illegal detention. See, e.g., State v. Baird, 763 P.2d 1214, 1217 (Utah Ct. App. 1988). Therefore, the validity of the searches and the conviction based upon the fruits of those searches turns upon the validity of the initial seizure of

appellant at the roadblock. There can be no question but that even a momentary, intentional stop by a law enforcement officer at a checkpoint constitutes a "seizure" within the constitutional meaning. See, e.g., Michigan Dept. of State Police v. Sitz, 58 L.W. 4781, 4783 (June 14, 1990).

Appellant will here follow the outline suggested in Davis and Wallentine, A Model for Analyzing the Constitutionality of Sobriety Roadblock Stops in Utah, 3 BYU J. PUB. L. 357, (1989), beginning with the question of whether there is statutory authority (which appellant believes is dispositive) and proceeding in the alternative, to whether the Utah Constitution prohibits roadblocks and then, again alternatively, whether this roadblock was planned and conducted in a constitutional manner.

POINT I. ROADBLOCK STOPS ARE UNCONSTITUTIONAL BECAUSE UTAH STATUTES LIMIT THE AUTHORITY OF OFFICERS TO DETAIN TO SITUATIONS WHERE THE OFFICER HAS REASONABLE AND INDIVIDUALIZED SUSPICION OF VIOLATION OF LAW.

As Davis and Wallentine, supra, stress, the first question to be resolved is the question whether the legislature has granted authority to officers to stop motorists at roadblocks:

> In order to be constitutional a roadblock must be premised upon state statutory authority, either explicit or implicit. Without such authority the roadblock is per

se unconstitutional.

3 BYU J. PUB. L. at 360. The United States Supreme Court held in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), that while Congress clearly could have constitutionally authorized a forcible entry to inspect a licensed liquor establishment without a warrant, Congress had not done so and therefore such an entry violated the Fourth Amendment. The Oregon Supreme Court likewise held that a detention at a roadblock was in violation of its state constitutional seizure protections because there was not statutory authority for roadblocks and, therefore, the Oregon court found it unnecessary to determine whether its legislature could have constitutionally authorized roadblocks. Nelson v. Lane County, 304 Ore. 97, 743 P.2d 692 (1987); accord, State v. Boyanosky, 304 Ore. 131, 743 P.2d 715 (1987); see also, State v. Smith, 674 P.2d 562 (Okla. Crim. App. 1984); State v. Henderson, 114 Ida. 293, 756 P.2d 1057 (1988).

The Oregon Supreme Court held that the statutory authority must be explicit and not implied:

> . . . roadblocks are seizures of the person or the person's effects. For this reason, the authority cannot be implied. Before they search or seize executive agencies must have explicit authority from outside the executive branch.

743 P.2d at 695.

Davis and Wallentine point out that there is no explicit statutory authorization in Utah but suggest that a Utah appellate court might find implied authority in general statutes concerning the duty to enforce laws. 3 BYU J. PUB. L. at 361-63. The district court, although not addressing this issue in its written Ruling, stated at the bench trial that it relied upon the oath officers take to uphold the laws which that court somehow construed to constitute legislative authority to effectuate appropriate roadblocks. Hearing Transcript, May 8, 1990, pp. 3-4.

The difficulty with the search for implied authority in Utah legislation, assuming that implied authority is constitutionally acceptable, is that the Utah Legislature has explicitly limited the authority of officers to effectuate both "administrative" and "investigatory" stops. Sergeant Mangelson claimed the roadblock was primarily for the purpose of checking for driver's licenses and vehicle registration and to inspect the vehicle for safety. (T-41-42). The Utah Legislature in the Motor Vehicle Act has defined the power of officers to stop motorists and inspect papers and the vehicle as follows:

> **Department and officers to enforce provisions.**
>
> The commission, and such officers and inspectors of the department as it shall designate, peace officers, state patrolmen, and others duly authorized by the department or by law shall have power and it shall be their duty:
>
> . . . .
>
> (c) When on duty, upon reasonable belief that any vehicle is being operated in violation of any provision of this act or of any under law regulating the operation of vehicles to require the driver thereof to stop, exhibit his driver's license and the registration card issued for the vehicles and submit to an inspection of such vehicle, the registration plates and registration card thereon.

Section 41-1-17, Utah Code. (Emphasis added). This limitation of the authority to stop and inspect to situations where an officer has reasonable belief that a particular vehicle is being operated in violation of law is additionally significant because of the fact that it is unusual. Professor LaFave states:

> Virtually all states have adopted legislation requiring every motorist to carry his driver's license while operating a vehicle and to display same upon demand of a police officer or other designated official. A representative statute reads as follows:
>
> > Every licensee or permittee shall have his drivers license or permit in his immediate possession at all times when operating a motor vehicle and, for the purpose of indicating compliance with the requirement shall display such license or permit if it is

> his possession upon demand made, when in uniform or displaying a badge or other sign of authority, by a member of the State Police, a sheriff or other police officer or designated agent of the Secretary of State.
>
> Similarly, the various jurisdictions have also adopted legislation requiring motorists to display upon demand the registration papers for the vehicles they are driving.

4 LaFave, Search and Seizure, 52, 53 (2d ed. 1987). (Footnotes omitted). Thus virtually every other state imposes a duty to display licenses and registration "upon demand", implying the right and power of officers to make the demand simply because a person is operating a vehicle. Sergeant Mangelson testified that he believed he was authorized to demand to inspect a driver's license simply because a person was driving. (T-23). This belief perhaps derives from some universal police lore which may have validity in virtually all other states but it is simply not true in Utah. A Utah driver has no duty to display his license or submit his vehicle to inspection unless he or she has done something to raise a belief of wrongdoing.

The United States Supreme Court in Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L.Ed.2d 660, (1979), while holding that random spot checks for purposes of checking licenses was a violation of the fourth amendment suggested in dictum that the states might develop less intrusive methods of checking driver's licenses such as stopping all traffic at a roadblock. 440 U.S.

at 664. However, while the Utah Legislature might authorize a roadblock for checking licenses without violating the Fourth Amendment, it has not done so, and, in legislation on the particular subject of driver's license display and vehicle inspection, it has limited the officer's right to stop to where he has a reasonable belief that a violation has occurred.

The question of whether the Utah Constitution would permit legislation authorizing the stopping of all traffic at a roadblock is discussed, infra, but the question is moot since the legislature has considered the question of how much authority to grant officers to stop vehicles for this purpose and chosen to limit it.

The secondary purpose of the roadblock was to observe for signs of other law violations. The Utah Legislature has also addressed the authority of officers to stop and detain persons for this purpose:

> A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

Section 77-7-15, Utah Code Ann. This court has said that: "Section 77-7-15 is the statutory codification for a

constitutional stop." State v. Sierra, 82 Utah Adv. Rep. 53, 55, 754 P.2d 972, 975 (Ct. App. 1988). But, regardless of whether the statute sets the constitutional standard, it does statutorily limit the authority a Utah peace officer has to interfere with a persons liberty and privacy for the purpose of investigating possible criminal violations. An officer's oath to enforce the law is an oath to act within the statutory law as well, and he acts unreasonably within the meaning of both the Fourth Amendment and Section 14, Article I of the Utah Constitution when he seizes a person and his vehicle without statutory authority.

The balancing of the need to infringe liberty to protect important government interests with the citizen's interest in the freedom of travel and privacy should be struck in the first instance by the legislature. The Utah Legislature has struck that balance in favor of the citizen's right to go unhampered about his business absent some individualized and reasonable suspicion that a violation of either motor vehicle laws or criminal laws has occurred.

Since the authority of Utah law enforcement officers to stop motorists for either the administrative purpose of checking the driver's license and vehicle safety or the investigative purpose of observing for violations of law has been limited, Sergeant Mangelson and his students acted in violation of the Fourth

Amendment and Section 14, Article I when they stopped and detained appellant at the roadblock in this case.

POINT II: ROADBLOCKS ARE PROHIBITED BY SECTION 14, ARTICLE I, OF THE CONSTITUTION OF UTAH.

This argument is made in the alternative to that made in Point I of this brief and assumes, contrarily to that argument, that law enforcement officers have statutory authority to stop all motorists either to check driver's licenses and vehicle safety or to make observations of possible violations of law.

The appellate courts of Utah have not, as of this date, ruled upon the validity of roadblocks under either the Constitution of Utah or the United States Constitution. The Utah Supreme Court in a recent decision by Justice Durham joined by Justice Zimmerman with Justice Stewart concurring "in the result" has recently applied Section 14, Article I, to protect the privacy interest in unoccupied automobiles independently from the similarly worded Fourth Amendment to the United States Constitution, quoting with approval the Washington Supreme Court in State v. Jackson, 102 Wash. 2d 432, 439, 688 P.2d 136, 140-41 (1984):

> Prior reliance on federal precedent and federal constitutional provisions [does] not preclude us from taking a more expansive

> view of [the state constitution] where the United States Supreme Court determines to further limit federal guarantees in a manner inconsistent with our prior pronouncements.

State v. Larocco, 135 Utah Adv. Rep. 16, 20 (Sup. Ct. May 20, 1990). Since the Utah Court has decided that the search and seizure protections of Section 14, Article I, may be more extensive than the federal protections, it is appropriate to first analyze the validity of roadblocks under the State Constitution. As the Washington Supreme Court stated in a similar case:

> When parties allege violation of rights under both the United States and Washington Constitutions, this court will first independently interpret and apply the Washington Constitution in order, among other concerns, to develop a body of independent jurisprudence, and because consideration of the United States Constitution first would be premature. State v. Coe, 101 Wash. 2d 364, 373-74, 679 P.2d 858 (1984). We find the sobriety checkpoint program illegal based on adequate and independent state grounds. Any federal cases cited are used only for the purpose of guidance and do not by themselves compel the result reached.

City of Seattle v. Mesiani, 755 P.2d 775, 776 (Wash. 1988) (en banc). See also, State v. Kirk, 493 A.2d 1271 (N.J. Super. 1985) (State constitution most appropriate to resolve roadblock issue). The determination of the constitutionality of roadblocks involves

the balancing of the governmental interest served by the roadblock against the intrusion upon the citizen's privacy interest and/or freedom of movement. It would seem apparent that the value to be placed upon privacy and freedom of movement would vary from place to place depending on the history and culture of the region, making the striking of that balance under state constitutions particularly appropriate. It is not surprising that, while the number of states upholding roadblocks (whether under state or federal constitution) slightly outnumbers those invalidating roadblocks, among states considered "Western" in culture, a strong majority have found roadblocks unconstitutional. See, State v. Henderson, 756 P.2d 1057, 1062 n.3 (Idaho 1988).[2] It is submitted that this follows from the greater importance placed upon both privacy and travel by automobile in the West.

Idaho, which has much in common historically and culturally with Utah, has a constitutional provision which is virtually

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[2] Of the jurisdictions listed in Henderson which have suppressed evidence from roadblocks six could be considered Western in culture: Arizona, South Dakota, Texas, Washington, Oregon, and Oklahoma. Idaho should be added to this group as a result of Henderson. Of the courts listed as upholding roadblocks, only three are from Western states: Arizona (which has also ruled the other way), California and New Mexico.

identical to Section 14, Article I of the Utah Constitution.[3] The Idaho Supreme Court interpreted that provision to prohibit a roadblock, designed to deter and apprehend drunk drivers, which was approved by the Boise Chief of Police, widely advertised as to date in advance and conducted similarly to the roadblock in the instant case. State v. Henderson, supra. That court found the state's interest in controlling drunk driving to be "compelling" and stated: "Protecting citizens from life-threatening danger is a paramount concern". Ibid., 756 P.2d at 1060. However, the Idaho court found from the evidence presented that roadblocks are inefficient and therefore were an unnecessary constraint upon a person's right to remain free of search and seizure absent probable cause. 756 P.2d at 1060-61. The court was also influenced by the lack of legislative authority for roadblocks. 756 P.2d at 1061-62. However, the Idaho court seemed most concerned with the fact that roadblocks constitute a seizure of the person and a search for evidence without any

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[3] Article I, §17 of the Idaho Constitution provides: **Unreasonable searches and seizures prohibited.**--The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.

individualized suspicion of wrongdoing by the person seized:

> Perhaps the most important attribute of our way of life in Idaho is individual liberty. A citizen is free to stroll the streets, hike the mountains, and float the rivers of this state without interference from the government. That is, police treat you as a criminal only if your actions correspond. Such is not the case with roadblocks.

756 P.2d at 1063. The court went on to hold roadblocks to be unconstitutional under the state constitution reserving the question of whether or not the legislature might sanction a method of conducting roadblocks with prior judicial approval:

> Accordingly, we hold that where police lack express legislative authority, particularized suspicion of criminal wrongdoing and prior judicial approval, roadblocks established to apprehend drunk drivers cannot withstand constitutional scrutiny. Although the United States Supreme Court has not yet decided whether warrantless roadblocks violate the federal constitution, we base our decision today solely on art. 1, § 17 of the Idaho Constitution. The Idaho Constitution can, where appropriate, grant more protection than its federal counterpart.

756 P.2d at 1063. (Citation omitted).

Other cases which have held warrantless roadblocks to check for drunk driving to violate the state constitutions in their jurisdictions without regard to how the roadblocks are conducted

or regulated are: Nelson v. Lane County, 403 Ore. 97, 743 P.2d 692 (1987); State v. Boyanovsky, 304 Ore. 181, 743 P.2d 711 (1987); City of Seattle v. Mesiani, 110 Wash. 2d 454, 755 P.2d 775 (1988).

While Utah appellate courts have not yet squarely ruled on the constitutionality of roadblocks, see State v. Talbot, 134 Utah Adv. Rep. 15, n. 4 (Ct. App. May 9, 1990) there are precedents indicating that Utah Courts are at least as sensitive to the privacy and mobility interests as the courts of Idaho, Washington and Oregon and raise questions regarding the validity of roadblocks. It is significant that the Utah Supreme Court relied upon the authority of Washington and Oregon courts in interpreting the Constitution of Utah as it applied to vehicle searches in State v. Larocco, supra, 135 Utah Adv. Rep. at 20. In State v. Talbot, supra, this court held that the avoidance of a roadblock by a motorist did not provide reasonable suspicion to stop and question the motorist. In so doing the court held that a person may choose to avoid and not talk to an officer when that person is in an automobile as well as on foot. The roadblock in the instant case was not voluntary--the officers were positioned to pursue any person who attempted to avoid it, even a passenger who might try to walk away. (T-25). If it were wholly voluntary it would be a "level one" stop and the Fourth

Amendment and, presumably, Section 14, Article I, would not apply. See, e.g., State v. Baird, 763 P.2d 1214, 1216 (Utah Ct. App. 1988). As this court indicated in Talbot, 134 Utah Adv. Rep. at 19, several courts which have validated roadblocks have taken into consideration the existence of a policy allowing persons to avoid roadblocks if they wish to. See, e.g., State v. Superior Court, 143 Ariz. 45, 691 P.2d 1073, 1075 (1984) (en banc) (officer would follow evader but not stop unless pursuant to other violation); Ingersoll v. Palmer, 43 Cal. 3d 1321, 241 Cal Rptr. 42, 743 P.2d 1299, 1315 (1987) (sufficient advance warning given so that motorist could avoid roadblock); Little v. State, 300 Md. 485, 479 A.2d 903, 906 (1984) (no action would be taken if driver chose to avoid roadblock); People v. Peil, 122 Misc. 2d 617, 471 N.Y.S.2d 532, 535 (Justice Ct. 1984) (had defendant chosen, he could have avoided roadblock without recourse by police).

However, where authority and the implicit threat of force are used to force a stop and enforce a detention, as was done in the instant case, the Utah appellate courts have uniformly required at least an articuable, reasonable suspicion that the person stopped has been, is, or is about to be engaged in unlawful activity. E.g., State v. Baird, supra; Sandy City v. Thorness, 115 Utah Adv. Rep. 28 (Ct. App. August 18, 1989); State

v. Schlosser, 108 Utah Adv. Rep. 38 (Sup. Ct. 1989). The Utah appellate courts have not recognized an exception to this requirement nor suggested that the stopping and detaining of all traffic vitiates the need for individualized, reasonable suspicion of wrongdoing. Certainly the intrusion on the citizen's liberty is not lessened because it is happening to everyone.

It is submitted that the Pennsylvania Superior Court correctly analyzed the situation when after review of the cases, if stated in Commonwealth v. Tarbert, 502 A.2d 221, 225-26 (Pa. Super. 1985):

> While the arguments supporting the constitutionality of systematic roadblocks are persuasive, the rationale supporting them is flawed. No amount of control or limited discretion can justify the "seizure" that takes place in the complete absence of probable cause or reasonable suspicion that a motor vehicle violation has occurred. Certainly, the Constitution of our Commonwealth affords its citizens the right to be free from intrusions where one has a reasonable expectation of privacy.

It is suggested that the Constitution of Utah affords its citizens no less. Section 14, Article I of the Constitution of Utah prohibits roadblocks regardless of how they are regulated or conducted for the reason that they result in a seizure of the person without reasonable suspicion of wrongdoing by the person

detained.

POINT III: ASSUMING THE CONSTITUTIONALITY OF ROADBLOCKS, THIS ROADBLOCK VIOLATED THE FOURTH AMENDMENT AND SECTION 14, ARTICLE I BECAUSE IT WAS NOT JUSTIFIED BY DEMONSTRATED NEED NOR PROPERLY REGULATED.

The United States Supreme Court and some state courts have held or suggested that roadblocks are constitutional if the state establishes that the public interest in controlling a problem out weighs the intrusion and the roadblock is properly regulated to limit the discretion of the officers in the field and to minimize the intrusion upon the rights of motorists. In Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 440 L.Ed.2d 660 (1979), the Court held it violated the Fourth Amendment to randomly stop motorists, in the absence of individualized suspicion of wrongdoing, for the purpose of checking drivers' licenses and vehicle registration documents. However, the Court observed:

> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.

440 U.S. at 664. In Michigan Dept. of State Police v. Sitz, 58 L.W. 4784 (June 14, 1990), the Supreme Court evaluated a checkpoint system which had been conducted under procedural guidelines promulgated by the Director of the Department of State

Police to check for signs of intoxication shown by motorists passing through. The average delay for each vehicle was 25 seconds. The Court stated:

> In sum, the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that is consistent with the Fourth Amendment.

58 L.W. at 4784.

Davis and Wallentine, A Model for Analyzing the Constitutionality of Sobriety Roadblock Stops in Utah, 4 BYU J. PUB. L. 357 (1989), summarizes the Fourth Amendment test for the validity of the seizure which occurs at roadblock as follows:

> The first step considers the gravity of public concerns served by the seizure as demonstrated by specific, objective facts. Second, the degree to which the seizure advances the public interest must be considered. Finally, and perhaps most importantly, the severity of the intrusion on individual liberty will be weighed.

3 BYU J. PUB. L. at 374-75. (Emphasis in original).

The record in the instant case is murky at best with regard to the public concern served by this roadblock. The district court found that the roadblock was a continuation of the

training session and was conducted for the purpose of checking for drivers licenses, registration, liability insurance, and auto safety and observing for any violation of the criminal law including alcohol and controlled substance abuse. Finding 3, Ruling (R-27). While it is conceded that the state has an interest in training officers and in enforcing motor vehicle regulations and the criminal law, these concerns are so broad as to be almost meaningless in the context of applying the first step of the constitutional test. Furthermore, there was no evidence elicited as to how the roadblock was perceived to advance these concerns. It is submitted that the state failed to demonstrate either what the particular public concern was or how the roadblock served that concern. The district court was therefore unable to evaluate those factors to properly determine if they outweighed the intrusion upon the rights of the motoring public. This failure is particularly significant in view of the fact that the decision to implement the roadblock in the first place was made by officers in the field rather than by either the legislature or high level, policy making officials in the executive branch. In Michigan Dept. of State Police v. Sitz, supra, the decision to implement the roadblock was made by the

Director of the Michigan Department of State Police[4] in response to the particularized problem of drunk driving and was implemented in accordance with guidelines regulating site selection, publicity and operations.

One measure of the severity of the intrusion is the amount of delay caused to the motorists whose journey is interrupted. The average delay in Michigan Dept. of State Police v. Sitz, supra, was 25 seconds, 58 L.W. 4782, Davis and Wallentine, supra, observe that "[m]ost roadblocks require only a few minutes time" and note case examples of fifteen to thirty seconds, five to twenty seconds; and two to three minutes. 3 BYU J. PUB. L. at 378-79, n. 124. Appellant and his passenger were detained in line for ten minutes before talking to the first officer. (T-69). The motorists who were not waived through or further detained because of "some problem" were delayed an additional two or three minutes answering questions or producing documents. (T-74). All the motorists inconvenienced by this roadblock were delayed far longer than those stopped at any of the roadblocks sustained in other jurisdictions. However, appellant contends that the length of time of the seizure is not the most important factor.

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[4] The decision does not indicate whether or not there was explicit legislative authority for checkpoints in Michigan.

There is a significant intrusion upon privacy when a law enforcement officer stops a vehicle, identifies the occupants and demands to know their destination. Although, this court has noted the citizen's right to refuse to answer, few people are aware of that right or have the courage to assert it, particularly when they perceive that their freedom to continue on their way is at risk.

The most flagrant deficiency in the planning and operation of this roadblock was the lack of regulations and standards imposed by policy making officials. Davis and Wallentine, supra, state:

> The restraint of subjectivity by officers in roadblocks is critical. Nearly every case assessing the constitutionality of a roadblock addresses the "neutral target criteria" aspect of the roadblock operation, and bases the decision on the presence and comprehensiveness of the operational formula designed to promote objectivity.

3 BYU J. PUB. L. at 379. Sergeant Mangelson devised his own plan which he submitted to his immediate supervisor, a lieutenant who is a section commander in the field.[5] This is hardly the

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[5] Sergeant Mangelson ordinarily supervised four troopers. His supervisor, Lieutenant Utley, supervised three sergeants in his "zone" which was comprised of two counties, Juab and Utah. Above the Lieutenant in the chain of command were a captain, an assistant superintendent and the Superintendent of the Highway Patrol. (T-38-40).

involvement by policy level officers, who might be expected to have a greater concern about the roadblock's intrusion on liberty and privacy and the imposition upon the time of citizens and voters, called for by the cases. See, e.g., State v. Hilleshiem, 291 N.W.2d 314, 318 (Iowa 1980) (pre-determination by policy making administrators of the time, location and procedures); Little v. State, 497 A.2d 903, 911 (Md. 1984) (field officers discretion carefully circumscribed by regulations previously established by high level administrative officials); Commonwealth v.McGeoghegan, 449 N.E.2d 349, 353 (Mass. 1983) (pre-arranged plan established by supervisory staff is essential); State v. Martin, 496 A.2d 442, 448 (Vt. 1985) (clear objective guidelines established by high level administrative officials).

As argued, supra, the legislature should make the decision in the first instance as to when, why and how roadblocks are to be used if they are not precluded by the state constitution. But, failing that, the Highway Patrol should establish standards and criteria which circumscribe the discretion of the officers in the field. This court required no less in resolving the analogous question of whether to permit officers to open containers during an otherwise valid inventory search of a vehicle whose driver has been arrested. In State v. Shamblin, 94 Utah Adv. Rep. 31 (Ct. App. 1988), this court held that

containers could be opened during an inventory search of a vehicle only if the opening of containers was mandated by a specific departmental procedure.

Furthermore, Sergeant Mangelson's self-devised plan was not always followed. While all non-commercial vehicles were directed into the coned-off lane to wait to be interrogated, according to the unrefuted testimony of Mr. Burke, not all drivers were asked to produce documents. He observed the officers waive through older couples without checking documents. (T-68).

It is often remarked in justification of imposing the exclusionary rule, that its purpose is not to protect the guilty who are before the court but the innocent whose rights might have been similarly imposed upon without incriminating result. Apparently, appellant and his passenger and, perhaps, two others cited for Marijuana possession, were the only ones found with contraband at this roadblock, but hundreds if not thousands of persons were inconvenienced and had their liberty and privacy infringed for no other reason than that they were traveling on an interstate highway during a time when Sergeant Mangelson was teaching other officers "techniques of getting into vehicles". (T-6).

If this court is to find roadblocks to be permissible

without statutory authority, it should at least mandate that the decision to conduct such roadblocks be made at the highest level of the executive department and that standards and regulations for the conducting roadblocks be promulgated which minimize as far as possible the intrusion upon the constitutionally protected interests of the traveling public. Since that was not done in the instant case, this court should find the initial seizure and resulting searches unconstitutional.

POINT IV: REGARDLESS OF THE LEGALITY OF THE ROADBLOCK AND THE INITIAL SEARCH, THE WARRANTLESS SEARCH OF APPELLANT'S LUGGAGE VIOLATED THE CONSTITUTION OF UTAH.

After the small amount of Marijuana and the vial of suspected cocaine had been discovered, and after appellant and Mr. Burke had been placed under arrest and handcuffed, Sergeant Mangelson and Patrolman Lloyd continued to search the vehicle, including suitcases that were in the back of the Blazer one of which, when opened, revealed the twenty-seven ounces of cocaine. (T-13).

In the district court, appellant sought to suppress this evidence, regardless of the legality of the initial seizure at the roadblock on the grounds that the search of the suitcases without a warrant violated the Fourth Amendment and Section 14, Article I of the Constitution of Utah. See, Memorandum in

Support of Motion to Suppress, 6-9 (R-14, 19-22).

The Utah Supreme Court has since clarified the law with respect to the application of the warrant requirement to automobile searches by interpreting the Section 14, Article I, Constitution of Utah independently of the Fourth Amendment to the United States making it unnecessary to analyze the confusing and conflicting federal cases on the subject on this appeal. Justice Durham, in State v. Larocco, 135 Utah Adv. Rep. 16, 23 (May 30, 1990), states:

> The Supreme Court's Chambers-through-Carney line of cases cannot be squared with the oft-stated principle that warrants-when-practicable is the best policy. 3 W. LaFave, Search and Seizure §7.2(b), at 35. These cases expand the automobile exception by ignoring the mobility factor and implementing the rationale of diminished expectation of privacy. This expansion and the vacillation between the warrant approach and the reasonableness approach have resulted in significant confusion about federal search and seizure law regarding automobiles.
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> . . . .
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> The time has come for this court, in applying an automobile exception to the warrant requirement of article I, section 14 of the Utah Constitution, to try to simplify, if possible, the search and seizure rules so that they can be more easily followed by the police and the courts, and, at the same time, provide the public with consistent and predictable protection against unreasonable searches and seizures. This can be accomplished by eliminating some of the confusing exceptions to the warrant

> requirement that have been developed by federal law in recent years. See id. Specifically, this court will continue to use the concept of expectation of privacy as a suitable threshold criterion for determining whether article I, section 14 is applicable. Then if article I, section 14 applies, warrantless searches will be permitted only where they satisfy their traditional justification, namely, to protect the safety of police or public or to prevent the destruction of evidence. See id.; see also, e.g., Chimel v. California, 395 U.S. 752, 762-63 (1969).

The proper analysis under the Constitution of Utah then is to determine (1) was there an invasion of an expectation of privacy; (2) if so, was there probable cause to search the suitcase; and (3) if so, was there an exception which justified a search without obtaining a warrant.[6]

If can hardly be doubted that appellant had a justifiable and reasonable expectation of privacy in his suitcase in the back of the vehicle he was driving and appellant will not here quarrel with the finding of the district court that the officers' had probable cause, assuming for purposes of this argument that the roadblock and resulting initial search was legal. The

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[6] While Justice Stewart concurred "in result" in Larocco without stating his views, his view as expressed in his own decisions in other cases is that, under the "Fourth Amendment, warrants are required unless an exception is shown. See, e.g., State v. Arroyo, 137 Utah Adv. Rep. 13, 15 (Sup. Ct. June 28, 1990).

remaining question is were there circumstances which justified an exception to the warrant requirement of Section 14, Article I. As Justice Durham in Larocco, supra, said:

> The next step requires justification of the warrantless search by showing either that the procurement of a warrant would have jeopardized the safety of the police officers or that the evidence was likely to have been lost or destroyed.

In the instant case the appellant and his passenger, while still at the scene, were handcuffed and in the custody of other officers. There was a total of thirty-five officers available in the immediate area. If there was a possible danger that the prisoners might break away, open the back of the vehicle and open a suitcase while handcuffed to obtain a weapon or somehow destroy the cocaine, which seems difficult to imagine, they could have been easily removed from the scene.

The Larocco, decision quoted State v. Hygh, 711 P.2d 264, 272 (Utah 1985) (J. Zimmerman concurring), as follows:

> Once the threat that the suspect will injure the officers with concealed weapons or will destroy evidence is gone, there is no persuasive reason why the officers cannot take the time to secure a warrant. Such a requirement would present little impediment to police investigations, especially in light of the ease with which warrants can be obtained under Utah's telephonic warrant statute, U.C.A., 1953, §7-23-4(2)(1982 ed.).

135 Utah Adv. Rep. at 23. The Larocco decision also affirmed that the burden of showing exigent circumstances is upon the state. 135 Utah Adv. Rep. at 24. In the instant case the state clearly failed to show that the delay which might have resulted if a warrant had been sought would have endangered the officers or the evidence.

The only other exception to the warrant requirement which might be argued is the impound inventory exception. See, State v. Hygh, 711 P.2d 264, 267 (Utah 1985). However, no claim was made at the hearing that the search of the suitcases was an inventory search.[7] Furthermore, this court has previously held that the opening of containers during a valid inventory search is prohibited by the Fourth Amendment to the United States Constitution in the absence of standardized, departmental regulations mandating the opening of all containers in inventory searches. State v. Shamblin, 94 Utah Adv. Rep. 31 (Ct. App. 1988).

Since the state has failed to prove any facts supporting an exception to the warrant requirement, the evidence seized from

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[7] There was an initial claim that the small vial containing Marijuana "roaches" which was found in an even later search was found in an inventory search. (T-14). However, on cross-examination the officer conceded it was a "plain search search" rather than an inventory search. (T-16). This later search at the impound lot was also illegal of course.

the appellant's suitcase should have been suppressed regardless of the legality of the initial detention and prior search of the vehicle.

CONCLUSION

Since the conviction in this case was based solely upon evidence which was seized in the course of searches which violated appellants rights secured by Section 14, Article I of the Constitution of Utah and the Fourth Amendment to the United States Constitution, this court should reverse the judgment and sentence of the district court.

RESPECTFULLY SUBMITTED this 24th day of August, 1990.

JOHN D. O'CONNELL
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that four copies of the foregoing Brief of Appellant were served upon R. PAUL VAN DAM, Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, by placing same in the United States Main on this 24th day of August, 1990.